

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

CLARK COUNTY CITIZENS UNITED, INC.,
FRIENDS OF CLARK COUNTY AND
FUTUREWISE,

Petitioners,

v.

CLARK COUNTY,

Respondent,

and

3B NORTHWEST LLC, CITY OF LA
CENTER, RDGB ROYAL FARMS LLC, RDGK
REST VIEW ESTATES LLC, RDGM
RAWHIDE ESTATES LLC, RDGF RIVER
VIEW ESTATES LLC, RDGS REAL VIEW
LLC, CITY OF BATTLE GROUND, CITY OF
RIDGEFIELD, and LAGLER REAL
PROPERTY LLC AND ACKERLAND LLC,

Intervenors.

CASE No. 16-2-0005c

**ORDER DENYING PARTIAL SUMMARY
JUDGMENT ON ISSUE 17
[RURAL INDUSTRIAL LAND BANKS]**

SYNOPSIS

The September 9, 2016, Final Order Granting Summary Judgment for Case No. 16-2-0002 is hereby vacated in its entirety. GMHB Cases 16-2-0002 and 16-2-0005c are consolidated under case caption 16-2-0005c, and remaining legal issues in both cases will be heard and decided at the Hearing on the Merits on January 12, 2017. Petitioners' motion for partial summary judgment (Issue 17) in Case No. 16-2-0005c is denied, and Issue 17 is dismissed. The Board expressly determines that there is no just reason for delay and

1 therefore enters this “final order” as contemplated by analogous Superior Court Civil Court
2 Rule 54(b).

3 4 **I. PROCEDURAL HISTORY**

5 Clark County addressed rural industrial land banks in an earlier Growth Management
6 Hearings Board (Board) Case No. 16-2-0002. That case began June 20, 2016, when the
7 Board of Clark County Councilors (County) adopted Ordinance Nos. 2016-04-03 and 2016-
8 05-03 designating two rural industrial land bank sites. The Friends of Clark County and
9 Futurewise (FOCC) filed a timely Petition for Review with the Board raising three issues in
10 which they alleged violations of chapter 36.70A RCW.¹ Pursuant to WAC 242-03-555,² the
11 Petitioners moved for, and the Board granted, summary judgment on Petitioners’ Issue 1.³
12 The Board found the County’s adoption of the Ordinances failed to meet statutory deadlines
13 in violation of RCW 36.70A.367(6) and 36.70A.130(4).⁴ The Board did not reach decisions
14 on the remaining two issues.
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16 The instant case follows shortly after Case No. 16-2-0002 when on June 28, 2016,
17 the County adopted Ordinance 2016-06-12 in which it designated rural industrial land banks
18 in its updated Comprehensive Land Use Plan (Plan). The updated Plan included goals,
19 policies and maps for rural industrial land banks. On July 22, 2016, FOCC filed a Petition
20 for Review with the Board claiming, as it did in Case No. 16-2-0002, that the County missed
21 legislative deadlines to establish rural industrial land banks and thus violated RCW
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24 ¹ GMHB No. 16-2-0002 (Petition for Review, June 20, 2016). Petitioners claim the County violated GMA by:
25 Issue 1. Establishing industrial land banks after GMA legislative deadlines, Issue 2. De-designating agricultural
26 lands of long-term commercial significance, and Issue 3. Failing to comply with requirements for industrial land
27 banks.

28 ² WAC 242-03-555(1) Dispositive motions on a limited record to determine the board's jurisdiction, the
29 standing of a petitioner, or the timeliness of the petition are permitted. The board rarely entertains a motion for
30 summary judgment except in a case of failure to act by a statutory deadline.

31 ³ GMHB No. 16-2-0002 (Final Order Granting Summary Judgment, September 9, 2016).

32 ⁴ RCW 36.70A.367 (6) In order to identify and approve locations for industrial land banks, the county shall take
action to designate one or more industrial land banks and adopt conforming regulations as provided by
subsection (2) of this section on or before the last date to complete that county's next periodic review under
RCW 36.70A.130(4) that occurs prior to December 31, 2016. The authority to take action to designate a land
bank area in the comprehensive plan expires if not acted upon by the county within the time frame provided in
this section. Once a land bank area has been identified in the county's comprehensive plan, the authority of
the county to process a master plan or site projects within an approved master plan does not expire.

1 36.70A.367(6) and .130(4). Here FOCC requests the Board to similarly grant summary
2 judgment for Issue 17 and impose invalidity on the County's actions regarding rural
3 industrial land banks.

4 5 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, 6 AND LEGAL STANDARDS FOR SUMMARY JUDGMENT**

7 The standard of review for Petitioners' motion for summary judgment and imposition
8 of invalidity is derived from:

- 9 • **RCW 36.70A.300(3) *Final Orders*** in which the Board must find the local
10 jurisdiction is or is not in compliance with GMA;
- 11 • **RCW 36.70A.302 *Determination of Invalidity*** in which the Board must a.) Find
12 non-compliance, b.) Issue an order of remand under RCW 36.70A.300, and c.)
13 Find the local jurisdiction's action would substantially interfere with fulfillment of
14 GMA goals and specify which parts of a comprehensive plan or regulation is
15 invalid. If the Board imposes invalidity, then invalidity is prospective and does not
16 extinguish vested rights;⁵ and;
- 17 • **WAC 242-03-555 *Dispositive Motions*** in which the Board may dispose of issues
18 or a case based on the Board's jurisdiction, petitioner's standing or timeliness of
19 petitioners.⁶

20 In regards to dispositive motions, the Board presumes comprehensive plans and
21 development regulations, and amendments, are valid upon adoption. This presumption
22 creates a high threshold for the Petitioners as the burden is on the Petitioners to
23 demonstrate that action taken by Clark County is clearly erroneous and not in compliance
24 with the GMA. The Board is charged with adjudicating GMA compliance and, when
25 necessary, invalidating noncompliant plans and development regulations. In order to find
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31 ⁵ RCW 36.70A.302 Growth management hearings board—Determination of invalidity—Vesting of development
32 permits—Interim controls.

⁶ RCW 242-03-555(1)... "The board rarely entertains a motion for summary judgment except in a case of
failure to act by a statutory deadline."

1 Clark County's action clearly erroneous, the Board must be "left with the firm and definite
2 conviction that a mistake has been committed."

3 The legal standard of review for Petitioners' motion for summary judgment is derived
4 from analogous Superior Court Civil Rule 56 which provides that summary judgment is
5 appropriate when all of the evidence and briefing show that there is no genuine issue as to
6 any material fact and that the moving party is entitled to a judgment as a matter of law.
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8 **III. PETITION FOR REVIEW**

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10 In June 2016, the Board of Clark County Councilors adopted ordinances designating
11 industrial land bank sites by amending the County's comprehensive plan policies and
12 regulations for industrial land banks.⁷ Petitioners timely filed a petition with the Board and in
13 Issue 17 claimed the County missed the legislative deadline to designate land banks.

14 **Issue 17**

15 Did the adoption of Amended Ordinance 2016-06-12 violate RCW 36.70A.367(6)
16 and RCW 36.70A.130(1)(d) because the industrial land banks were designated
17 after the deadline in RCW 36.70A.367(6) and RCW 36.70A.130(4)? See
18 Amended Ordinance 2016-06-12 and Exhibit 1 Clark County, Washington 20 Year
19 Comprehensive Growth Management Plan 2015-2035 p. 31, pp. 36 – 37, p. 97, p.
20 228, p. 402, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark
21 County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County,
Washington [map]. [FOCC/FW No. 9]

22 Petitioners request that the Board find the County in violation of the GMA, remand the
23 ordinances to the County, and make a determination of invalidity.⁸
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25 **IV. MOTION FOR SUMMARY JUDGMENT, INVALIDITY AND RESPONSES**

26 In its motion for summary judgment, FOCC claims the County established rural
27 industrial land banks over 11 years after the legislative deadline when it adopted
28 Ordinances 2016-04-03, 2016-05-03 and 2016-06-12 in June 2016. FOCC repeats its
29 arguments from Case No. 16-2-0002 in which it argued the language in RCW 36.70A.367(6)
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32 ⁷ Clark County Ordinance No. 2016-04-03 (April 26, 2016) and Ordinance No. 2016-05-03 (May 10, 2016).

⁸ FOCC Petition for Review Comprehensive Plan and Development Regulations Update (July 22, 2016) at 7.

1 required Clark County to establish land banks by December 1, 2004.⁹ FOCC says the
2 County failed to do so and thus it violated GMA. FOCC recaps the Board's recent decision
3 in the prior industrial land bank case in which the Board granted summary judgment due to
4 a failure by the County to meet statutory deadlines. In that decision, the Board concluded
5 that RCW 36.70A.367(6) directed Clark County to approve industrial land banks by 2004,
6 but Clark County failed to do so. The Board found Petitioners met their burden of proof that
7 the County violated RCW 36.70A.367(6) and granted summary judgment.¹⁰

9 Here, Petitioners argue that because the County repeated its decision to establish
10 industrial land banks in their 2016 Comprehensive Plan update, the facts and laws have not
11 changed. As before, the County's Comprehensive Plan update in Ordinance 2016-06-12
12 violates the GMA because the industrial land bank provisions were adopted after GMA
13 deadlines.¹¹ FOCC makes the same request as in Case No. 16-2-0002 that the Board find
14 non-compliance, issue an order of remand, and impose a determination of invalidity on
15 industrial land banks.¹²

17 Clark County responds to FOCC's motion and invalidity request by acknowledging
18 the Board's previous decision to grant summary judgment in Case No. 16-2-0002. But here
19 the County asks the Board to review the recent *Hirst* decision by the Supreme Court.¹³
20 According to the County, this decision says tribunals must consider the GMA as a whole,
21 rather than a single word, and the County requests that the Board deny FOCC's motion.¹⁴
22 Intervenor Lagler Real Property LLC (Lagler) argue FOCC's motion should be denied as
23 the Board has already ruled on the question of timeliness of establishing industrial land
24 banks. Lagler contends that FOCC cannot have "two bites at the apple" on issues already
25 raised and decided by the Board.¹⁵

28 ⁹ FOCC Dispositive Motion or Motion for Summary Judgment (October 14, 2016) at 10-15.

29 ¹⁰ GMHB No. 16-2-0002 (Final Order Granting Summary Judgment, September 9, 2016).

30 ¹¹ FOCC Dispositive Motion or Motion for Summary Judgment (October 14, 2016) at 12.

31 ¹² Id. at 22.

32 ¹³ *Whatcom County v. Hirst*, No 91475-3, ___ Wn.2d ___, (October 6, 2016).

¹⁴ Respondent Clark County (October 31, 2016) at 2.

¹⁵ Intervenor Lagler Real Property LLC Opposition to FOCC and Motion for Summary Judgment (October 31, 2016) at 3.

V. DISCUSSION AND ANALYSIS

Prior GMHB Case No. 16-2-0002

In prior GMHB Case No. 16-2-0002, on September 9, 2016, the Board granted Petitioners' Motion for Summary Judgment and ruled in pertinent part as follows:

The legislature may have intended to extend the deadlines, but the Board can only construe legislative intent when it is ambiguous, not when the statute is unambiguous. RCW 36.70A.367(6) unambiguously states a county must act by the deadlines established in RCW 36.70A.130(4), and the deadline in RCW 36.70A.130(4) is the year 2004. . . .¹⁶

While the legislature changed the deadlines for comprehensive plan updates in RCW 36.70A.130(5) to 2016, it did not amend RCW 36.70A.367(6) to cross reference the 2016 deadline in RCW 36.70A.130(5). Instead, the legislature simply added a clause in RCW 36.70A.367(6): "that occurs prior to December 31, 2016. . . .

We find the County had until 2004 to designate industrial land banks under RCW 36.70A.367(6). . . .

Clark County did not adopt industrial land banks by 2004 and thus the County violated RCW 36.70A.367(6).¹⁷

¹⁶ **RCW 36.70A.367(6)** In order to identify and approve locations for industrial land banks, the county shall take action to designate one or more industrial land banks and adopt conforming regulations as provided by subsection (2) of this section on or before the last date to complete that county's next periodic review under RCW 36.70A.130(4) that occurs prior to December 31, 2016. The authority to take action to designate a land bank area in the comprehensive plan expires if not acted upon by the county within the time frame provided in this section." (Emphasis added).

RCW 36.70A.130(4) states: "Except as provided in subsection (6) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows: (a) *On or before December 1, 2004*, for Clallam, *Clark*, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties; (Emphasis added).

¹⁷ [Emphasis added] GMHB No. 16-2-0002 (Final Order Granting Summary Judgment, September 9, 2016) at 5. **RCW 36.70A.367(6)** states: "In order to identify and approve locations for industrial land banks, the county shall take action to designate one or more industrial land banks and adopt conforming regulations as provided by subsection (2) of this section on or before the last date to complete that county's next periodic review under RCW 36.70A.130(4) that occurs prior to December 31, 2016. The authority to take action to designate a land bank area in the comprehensive plan expires if not acted upon by the county within the time frame provided in this section.

1 However, newly discovered evidence, specifically, legislative history which was
2 reviewed and considered by the Board on its own motion, indicates that RCW
3 36.70A.367(6) was first enacted by the Legislature in 2007. This means that the deadline to
4 designate industrial land banks under RCW 36.70A.367(6) could not have been 2004.
5 Thus, the Board made a mistake of law in its September 9, 2016, decision.
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7 **Legislative History – Industrial Land Banks**

8 To properly understand the legislative history of RCW 36.70A.367, the Board
9 reviewed Washington State Legislative chapter laws enacted to address industrial land
10 banks. The Board wanted to know the legislature's intent in establishing the process and
11 timing for industrial land banks. The legislature first addressed the demand for siting major
12 industrial facilities in 1995, but then in 1996 recognized that the case-by-case procedure for
13 evaluating and approving sites could operate to a community's economic disadvantage
14 when a private business must make decisions expeditiously. Thus, the 1996 Legislature
15 authorized a pilot project to evaluate a process under which a bank of major industrial
16 development sites could be located outside urban growth areas (UGAs).¹⁸ The pilot project
17 was limited to counties with populations greater than 250,000 and imposed other
18 requirements such as impact fees, transportation plans, and environmental protections.
19 Final approval of industrial land banks had to be considered as an amendment to the
20 comprehensive plan, but no deadline for adoption was required. Instead, the 1996
21 Legislature stated industrial lands could be considered anytime and the timing requirements
22 in RCW 36.70A.130(2) did not apply.
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25 “...except that RCW 36.70A.130(2) does not apply ***so that inclusion or***
26 ***exclusion of master planned locations may be considered at any***
27 ***time.*”¹⁹** (Emphasis added)
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32 ¹⁸ HB 2467, Ch. 167, Laws of 1996 Sec. 1.

¹⁹ Id. Sec. 4.

1 The second pertinent legislative change to RCW 36.70A.367, regarding timing of
2 industrial land banks came in 2001 with ESHB 1997 in which the authority to include or
3 exclude industrial land banks from urban areas lapsed if not acted upon by December 31,
4 2002. A third change came in 2002 when the legislature clarified that a county “**shall**
5 **review the need for industrial land banks**... during the review and evaluation of its
6 comprehensive plans required by RCW 36.70A.130.”²⁰ Only in 2007, does the legislature
7 address, in detail, a two-step process to designate industrial land banks:
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9 Sec. 1 (2) A master planned location for major industrial developments may
10 be approved through a two-step process: Designation of an industrial land
11 bank area in the comprehensive plan; and subsequent approval of
12 specific major industrial developments through a local master plan
13 process described under subsection (3) of this section.²¹

14 The 2007 Legislature further required this process would be done through the county
15 comprehensive plan.²² Regarding the timing to update the plan, the 2007 Legislature
16 required a jurisdiction to take action on or before the county’s next periodic comprehensive
17 plan review as required under RCW 36.70A.130(4) that occurs prior to December 31,
18 2014.²³ Although the legislature did not change the reference to Subsection (4) in the 2007
19 legislation, it changed the due date to “on or before” the last date to complete a county’s
20 next periodic review that occurs prior to 2014. And, yet again in 2014, the Legislature
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24 ²⁰ EHB 2498, Ch. 305, Laws of 2002. Sec. (7)(a) The authority of a county meeting the criteria of subsection
25 (9) of this section to engage in the process of including or excluding master planned locations from the urban
26 industrial land bank shall terminate on December 31, ((1999)) 2007. However, any location included in the
27 urban industrial land bank on or before December 31, ((1999)) 2007, shall be available for major industrial
28 development as long as the criteria of subsection (2) of this section are met. A county that has established
29 or proposes to establish an industrial land bank pursuant to this section **shall review the need for an**
30 industrial land bank within the county, including a review of the availability of land for industrial and
31 manufacturing uses within the urban growth area, during the review and evaluation of comprehensive plans
32 and development regulations required by RCW 36.70A.130. (Emphasis added).

²¹ SHB 1965, Ch. 433, Laws of 2007 Sec. 1 at 4.

²² Id.

²³ Id. (6) In order to identify and approve locations for industrial land banks, the county shall take action to
designate one or more industrial land banks and adopt conforming regulations as provided by RCW
36.70A.367(2) on or before the last date to complete that county’s next periodic review under RCW
36.70A.130(4) that occurs prior to December 31, 2014.

1 extended the date to 2016.²⁴

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3 **Pending Motion for Summary Judgment**

4 After considering all of the arguments made in the pending motion for summary
5 judgment together with newly considered legislative history of RCW 36.70A.367(6), the
6 Board finds that RCW 36.70A.367(6), as currently written, was first enacted by the
7 Legislature in 2007.²⁵ The deadline to designate industrial land banks under RCW
8 36.70A.367(6) would not have been 2004 because the law did not come into effect until
9 three years later. Since the Board made a mistake of law in its September 9, 2016, decision,
10 it will be necessary to vacate that decision under the analogous principles of Superior Court
11 Civil Rule 60, which provides that a final order may be vacated *inter alia* for the following
12 reasons:
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- 14 • Mistakes,
- 15 • Inadvertence,
- 16 • Surprise,
- 17 • Excusable neglect,
- 18 • Newly discovered evidence,
- 19 • Any other reason justifying relief from the operation of a final order.

20 The Board finds and concludes: (1) the Civil Rule 60 standards to vacate a final order
21 are met in this situation and (2) Cases 16-2-0002 and 16-2-0005c present substantially
22 overlapping and in some instances identical issues regarding the same comprehensive
23 plan, thus satisfying the standards for consolidation under RCW 36.70A.290(5).
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25 The motion for summary judgment should be denied for Issue 17.
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30 ²⁴ HB 1360, Ch. 149, Laws of 2014 at 4-5 6) In order to identify and approve locations for industrial land
31 banks, the county shall take action to designate one or more industrial land banks and adopt conforming
32 regulations as provided by subsection (2) of this section on or before the last date to complete that county's
next periodic review under RCW 36.70A.130(4) that occurs prior to **December 31, ((2014)) 2016.**
(Emphasis added).

²⁵ SHB 1965, Ch. 433, Laws of 2007 Sec. 1 at 4

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VI. ORDER

Based upon the foregoing, the Board enters this order as follows:

- GMHB Final Order Granting Summary Judgment for Case No. 16-2-0002 (September 9, 2016) is hereby vacated in its entirety.
- GMHB Cases 16-2-0002 and 16-2-0005c are hereby consolidated under case caption 16-2-0005c, and the legal issues in both cases will be heard and decided at the Hearing on the Merits on January 12, 2017.
- Petitioners' motion for partial summary judgment (Issue 17) in Case No. 16-2-0005c is denied, and Issue 17 is dismissed.
- The Board expressly determines that there is no just reason for delay and therefore enters this "final order" as contemplated by analogous Superior Court Civil Court Rule 54(b).

DATED this 29th day of November, 2016.

Nina Carter, Presiding Officer

William Roehl, Board Member

Raymond L. Paoella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²⁶

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²⁶ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.